

**STATE OF VERMONT
LIQUOR CONTROL BOARD**

**In Re: DUSTY BOTTLE, LLC
 9 BARTON STREET
 BRADFORD, VERMONT**

BOARD DECISION AND ORDER

Dusty Bottle, LLC (“Licensee”) appeared before the Liquor Control Board (“Board”) on March 4, 2015 in Montpelier for a Contested Case Hearing to consider the suspension or revocation of its First and Third Class Liquor Licenses for alleged violations of General Regulation Nos. 17 and 36(a) on October 17, 2014. Jacob A. Humbert, Esq., Assistant Attorney General, represented the Department of Liquor Control (“DLC”). Larry Pike, owner of Licensee, appeared on its behalf. Licensee declined an invitation to submit Proposed Findings of Fact and Conclusions of Law for the Board’s consideration.

In reaching a majority decision to **SUSPEND** Licensee’s liquor licenses for **Ten (10) days** based on violations of both General Regulation Nos. 17 and 36(a) and to further condition these licenses to restrict service of alcoholic beverages after 1:00 a.m. each business day, the Board makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. At all relevant times, Licensee held First-Class and Third-Class Liquor Licenses, permitting the sale of beer, wine and spirits to the public for on-premises consumption.
2. DLC asserts that Licensee violated these General Regulations on October 17, 2014:
 - a. General Regulation No. 17: No licensee shall sell or furnish alcoholic beverages to any individual displaying signs of intoxication from alcoholic beverages or other drugs / substances. No licensee shall allow alcoholic beverages to be consumed on the licensed premises by any individual displaying such signs of intoxication. No licensee shall allow any individual displaying such signs of intoxication to stay on the licensed premises, except under direct personal supervision by a licensee or licensee employee in a segregated nonpublic area

when the patron's immediate departure could be expected to pose a risk of bodily injury to the patron or any other individual.

- b. General Regulation 36(a): The Board may find, that a licensee suffered a disturbance, brawl, fight or illegal activity upon the licensed premises or upon the streets, sidewalks, parking lots or highways adjacent thereto if any individual engaged in such conduct had been allowed to stay on the licensed premises while displaying signs of intoxication from alcohol, drugs or other substances, and/or if it would be reasonable to expect that such individual would be intoxicated as a result of the amount of alcohol served to that individual. Under such facts, the Board may conclude that any such individual's conduct should have been anticipated.
3. The following Findings are based on the testimony of:
 - a. Trooper Sean Brennan, Vermont State Police;
 - b. Trooper David Shaffer, Vermont State Police;
 - c. Teri Lazzara of Groton, Vermont;
 - d. Sharon Velazquez, Licensee's employee; and
 - e. Mr. Pike.
4. All alleged violations stem from events occurring on October 17, 2014 (and past midnight into October 18, 2014) inside and outside of Licensee's establishment, including an altercation outside Licensee's establishment involving a patron, Devin Fryar, as well as overservice of Mr. Fryar and several other patrons.
5. Trooper Brennan's testimony was as follows:
 - a. He has served with the Vermont State Police, Bradford Barracks, since January 2012 and is a certified law enforcement officer. He was called to the scene of a "bar fight" at approximately 11:52 p.m. on October 17, 2014. He arrived immediately thereafter, since he was "right around the corner."
 - b. Upon arriving, he observed 50-60 people outside Licensee's establishment.
 - c. The crowd scattered in response to his cruiser's lights.
 - d. He noted several people standing around a vehicle approximately 50 feet from the Licensee's entrance.

- e. Near that vehicle, Tpr. Brennan saw a person he later identified as Seth Florentine. Mr. Florentine was a “bloody mess,” with a swollen face and cuts on his cheek. He told Mr. Florentine, who was trying to get up and was staggering around, to remain on the ground. Mr. Florentine appeared “woozy” and was “going in and out of consciousness.” EMS was called.
- f. Tpr. Brennan noticed a male, he later identified as Devin Fryar, walking away from the vehicle and had taken his shirt off. Mr. Fryar was combative. He had marks on his face, but reported to Tpr. Brennan that he had fallen. It was obvious to Tpr. Brennan that he had been involved in the altercation with Mr. Florentine.
- g. At one point, Mr. Fryar put his finger in Tpr. Brennan’s face, yelled at him and stood in a bladed position, looking to fight. Mr. Fryar was pretty “jacked up” and his “adrenaline was going” according to Tpr. Brennan. Mr. Fryar continued to yell in Florentine’s direction. He was asked to put his hands behind his back. Tpr. Brennan went to put Mr. Fryar in handcuffs, but he would not cooperate. With Tpr. Shaffer’s assistance, Mr. Fryar was placed in a Vermont State Police cruiser.
- h. Tpr. Brennan did not interview any employee of Licensee, but did speak to Kevin and Scott Pulsifer (Mr. Florentine’s cousins who were drinking at Licensee’s establishment that night) about the incident, but there was not much to glean because they were highly intoxicated (demonstrating bloodshot, watery eyes, slurred speech, and were unsteady on their feet).
- i. Tpr. Brennan understood that the fight involved Mr. Fryar as the aggressor, punching and knocking Mr. Florentine to the ground. Two of Mr. Fryar’s unnamed friends may have kicked Florentine when he was on the ground.
- j. Tpr. Brennan testified that one of Licensee’s bartenders was cooperative, and even recommended photos be taken of a vehicle outside that had blood on it from the fight.
- k. A non-evidentiary, preliminary breath test was administered to Mr. Fryar at the Bradford Barracks and had a BAC of approximately .110. Additionally, the smell of alcohol and bloodshot eyes signified to Tpr. Brennan that Mr. Fryar was

intoxicated. Mr. Fryar ended up treating at Dartmouth Hitchcock Medical Center that night.

1. Mr. Florentine came to the Bradford Barracks the following day. Tpr. Brennan photographed him; this photograph was admitted as State's Exhibit 2. Tpr. Brennan later learned that Mr. Florentine had a broken orbital bone and missing teeth, among other injuries, from the fight.

6. Trooper Shaffer's testimony was as follows:

- a. Tpr. David Shaffer has served with the Vermont State Police, Bradford Barracks, since January 2006 and is a certified law enforcement officer. In the course of his police service, he has encountered thousands of intoxicated people and been involved in hundreds of DUI arrests.
- b. He was at traffic stop when the call came in for the bar fight. He was about two miles away.
- c. He arrived at the scene shortly before midnight. He noted a crowd of 50-60 people outside of the bar. He was concerned for his own safety. He described the scene as "dangerous." In his estimation, ten officers were required to get the scene under control and not the two (including him) that responded.
- d. He saw Tpr. Brennan engaged with Mr. Fryar, who was aggressive and looked ready to fight, standing with a bladed stance. Mr. Fryar's lips were swollen and bloody.
- e. Tpr. Shaffer noted a strong odor of intoxicants on Mr. Fryar; he appeared extremely intoxicated.
- f. He corroborated Tpr. Brennan's statement that Mr. Fryar resisted being handcuffed.
- g. While resisting, some part of Mr. Fryar slammed into Tpr. Shaffer's head knocking out one of the trooper's contact lenses.
- h. The fight had occurred adjacent to a bartender's vehicle, which now had "pieces of human body parts" on it.

- i. He testified to his concern that Mr. Pike apparently insisted on standing behind Tpr. Brennan, but he ultimately cooperated and stood out of the way.
- j. Tpr. Shaffer ordered that the bar close down for the night. This did not happen as quickly as he would have liked. The music continued. Intoxicated people remained in and outside the premises. The crowd finally disbursed with some car tires squealing as vehicles spend away.
- k. Overall, Tpr. Shaffer testified that he personally dealt with six or seven highly intoxicated people, including the Pulsifers.
- l. Tpr. Shaffer did not take statements from or interview any employee of Licensee; his focus was on the injured victim and quelling what they described as a dangerous scene.
- m. He stated that Mr. Pike indicated that the intoxicated people were not his fault, but his bartender's fault, a statement that Mr. Pike denies.
- n. To Tpr. Shaffer, Mr. Florentine looked like his nose was "destroyed." He appeared to be extremely intoxicated. Tpr. Shaffer took a photograph of Mr. Florentine at the scene. This was admitted into evidence as State's Exhibit 1.

7. Ms. Lazzara testified as follows:

- a. She was a patron at Licensee's bar on October 17, 2014.
- b. She denied drinking at any other bar that night before going there, but engaged in "pregaming," drinking as many as five Fireball shots (which the Board notes is cinnamon whiskey containing approximately 33% alcohol by volume) at a private residence.
- c. She testified that her memory of events that night was not very good.
- d. She recalls arriving at Licensee's bar between 10:00 and 11:00 with the Pulsifers and a friend named "Katie" (the "Lazzara party").
- e. She was intoxicated before she came to the Licensee's bar and then had at least one Bud Light at the bar. She did not directly purchase any drinks directly; her boyfriend, Kevin Pulsifer, bought the drinks, for her.

- f. While at the bar, she saw Mr. Florentine. He asked if the Lazzara party could walk him to his car as he had been anticipating trouble with some unidentified people. They agreed.
- g. Upon leaving the bar, her group was approached by people she did not know at the time. Mr. Fryar was part of this group. Mr. Fryar confronted Mr. Florentine and dared him to “throw the first punch.” Mr. Florentine apparently refused and Mr. Fryar punched him, knocking him to the ground. At this point, “everyone started fighting,” including the Pulsifers. The fight continued until the police appeared.
- h. Ms. Lazzara was covered in Mr. Florentine’s blood.
- i. Ms. Lazzara testified that she never saw Mr. Florentine drinking or intoxicated at Licensee’s establishment; but they did dance together.
- j. She did not know if Mr. Fryar was ever in the bar.

8. The State rested after calling Ms. Lazzara.

9. Sharon Velazquez testified as follows for Licensee:

- a. She is the Licensee’s employee, fiancée of owner Mr. Pike and investor of a few thousand dollars in the business. She is also Licensee’s bookkeeper and works as a “peacekeeper,” which is another term for bouncer. She denied any supervisory responsibility over other employees.
- b. Ms. Velazquez testified that “I walk around the bar and I take pictures of people and I judge whether they are under the influence or what their levels are.” She apparently looks for people that are showing signs of intoxication.
- c. Ms. Velazquez confirmed that Mr. Fryar was at the Licensee’s bar on October 17, 2014.
- d. At approximately 11:45 p.m., she walked over to Mr. Fryar who “was getting loud” and asked him “can I get a sobriety test from you.” She later downplayed this by saying she really was not concerned that he was intoxicated. Nevertheless, she testified that she wanted to “check to see if [Fryar] was alright” and she asked

him to stand on one leg. She alleged that he was able to do this with “no problem.”

- e. During this exchange, Ms. Velazquez took a picture of Mr. Fryar standing on one leg, time stamped with a time of 11:45 p.m. Mr. Pike elected not to offer the photo, which was apparently brought with him to the hearing, into evidence. This picture was taken mere minutes before the fight.
- f. Shortly thereafter, Ms. Velazquez learned of the fight from outside and called the police immediately.
- g. She testified that Mr. Pike stayed 15-20 feet away from the police when they investigated.

10. Mr. Pike testified as follows¹:

- a. He testified that he does not dispute that there was a fight, but that “everything was copasetic inside the bar” beforehand.
- b. He does not dispute that Mr. Fryar was inside his establishment prior to the fight.
- c. He testified that Mr. Fryar was seated at the bar with “one of his constituents,” his designated driver.
- d. Mr. Pike testified that Mr. Fryar had opened a bar tab that night.
- e. He does not dispute that Mr. Fryar was served alcoholic beverages at his establishment. He wanted to be clear, however, that it was not he, but his bartender, a Ms. Phelps, who served him. He identified Ms. Phelps further as “the one that got her car spattered [with blood].”
- f. Mr. Pike testified that he “tuned” into a conversation had by Mr. Fryar where he and his designated driver boasted about “how tough they were;” they did not mention any specific plans to fight anyone.
- g. He testified that “our bartender had apparently shut him off,” which indicated a concern that Mr. Fryar may have had too much to drink. In response to being cut off, Mr. Fryar “rose a little bit of a stink about it, but he was calmed down.”

¹ Since he was not represented, he was permitted to simply “tell his side of the story” with significant leeway granted by the Board with respect to the introduction of hearsay testimony.

- h. Mr. Pike appeared aware that Mr. Fryar was unable to and/or unlicensed to drive a motor vehicle and asked the gentleman with him how Mr. Fryar was getting home that evening.
- i. Despite his bartender cutting him off, despite Mr. Fryar's reaction to that and despite Mr. Pike asking how Mr. Fryar would be getting home that evening, Mr. Pike testified that Mr. Fryar was "not showing any signs of intoxication."
- j. Mr. Pike watched Mr. Fryar and his designated driver walk out of the building. He states that the fight occurred fifteen minutes later. He went out and began pulling people off a pile of those engaged in the fight, with Mr. Fryar at the bottom of said pile. He did not notice any serious injuries. The police arrived about a minute after that.
- k. Mr. Pike indicates that he cooperated with the police directive to shut down the bar. He indicated that he told the band to wind down their song. They continued to play prerecorded soft music. Mr. Pike indicated that he did not want his patrons to leave given the situation outside because it got out of hand when the police showed up.
- l. Mr. Pike believes that Ms. Lazzara and her "constituents" were not allowed in his establishment and did not drink there.

CONCLUSIONS OF LAW

1. The Board is established as the paramount authority in the administration of Vermont's liquor statutes and regulations. *See Verrill, Jr. v. Daley, Jr.*, 126 Vt. 444, 446 (1967).
2. When passing upon the question whether the license shall be revoked or suspended for the violation of a liquor statute or regulation, the Board sits as a tribunal with a judicial function to perform and has statutory authority under 7 V.S.A. §236 to suspend or revoke any license for violating the provisions of Title 7 or any regulation. *See In Re: Wakefield*, 107 Vt. 180, 190 (1935).

3. Licensee holds First and Third-Class Liquor Licenses as defined by 7 V.S.A. §2(10) and §(22) and is, therefore, subject to this Board's jurisdiction.
4. Licensee was properly notified of its alleged violations, discussed above, and of its right to appear at a hearing to respond to these alleged violations consistent with 3 V.S.A. §809(a)-(c). The Hearing was held and the evidence closed on March 4, 2015.
5. DLC must prove all alleged violations by a preponderance of the evidence. If any violations are found, then the Board has concluded that DLC has met its burden.
6. Consistent with the above Findings of Fact, the Board concludes that Licensee violated General Regulations No. 17 and 36(a). Our reasoning follows:
7. Violation of General Regulation No. 17:
 - a. This Board has historically noted that to determine whether a Licensee served patron(s) displaying signs of intoxication, we are faced with determining the most probable explanation from a combination of direct evidence and circumstantial evidence. Of course, "recognition of the fact that a person is in a drunken or intoxicated condition requires no peculiar scientific knowledge," however both testifying State Troopers are well-trained and well-qualified with respect to determining whether someone shows signs of intoxication. *See, e.g., Ackerman v. Kogut*, 117 Vt. 40, 44 (1951) (citations omitted); *In re: Rusty Nail Acquisition, Inc.*, 2009 VT 68 at ¶ 8.
 - b. The testifying troopers arrived at the premises and responded to the fight outside. They were not present inside the License's establishment, but encountered numerous patrons outside the licensed establishment that had been drinking in the licensed establishment. Of course, "Intoxication may be evidenced circumstantially by prior or subsequent condition of intoxication within such a time that the condition may be supposed to be continuous..." This accords with

our rule that an inference may be and often is retroactive.” *See Ackerman v. Kogut*, 117 Vt. 40, 44, 84 A.2d 131, 134 (1951) (citations omitted).

- c. Specifically, both State Troopers testified credibly that Mr. Fryar, Mr. Florentine, Messrs. Pulsifer and Ms. Lazzara were intoxicated along with numerous others patrons at or outside the licensed premises who exhibited clear signs that they were under the influence of intoxicating liquor. Ms. Lazzara testified credibly to her own intoxication and service of beer to her, via her boyfriend, at Licensee’s establishment and that both Pulsifers had been drinking inside Licensee’s establishment. The connection between these patrons’ intoxication outside at the scene of the fight and service of alcoholic beverages inside Licensee’s establishment was, therefore, made.
- d. The Board concludes that Licensee furnished alcoholic beverages to several patrons displaying signs of intoxication from alcoholic beverages; that Licensee allowed alcoholic beverages to be consumed on the licensed premises by individuals displaying such signs of intoxication; and that Licensee permitted individuals displaying such signs of intoxication to stay on the licensed premises. Licensee, therefore, violated General Regulation No. 17.
- e. Finally, it is troubling that Mr. Pike testified that he did not notice that Mr. Fryar showed any signs of intoxication given his awareness, *inter alia*, that his own bartender had stopped serving him. Mr. Pike’s testimony on this issue is simply not credible.

8. Violation of General Regulation No. 36(a):

- a. As an initial matter, our conclusion that Licensee violated General Regulation No. 36(a) stems primarily from Licensee and its witnesses’ testimony, not from the State’s presentation of evidence. While the State certainly established that there was a fight and that the fight’s participants were intoxicated, none of the State’s witnesses placed the protagonist, Mr. Fryar, inside the licensed establishment or proved that he was served any alcoholic beverages there. Mr. Pike and Ms. Velazquez’s testimony, however, conclusively established the necessary facts to

link the Licensee's conduct inside the licensed establishment to the brutal altercation that occurred outside.

- a. General Regulation No. 36(a) charges the licensee with the affirmative duty to become aware of and prevent prohibited conduct by its patrons. *See In re Capital Investment Co. d/b/a The Dancing Red Whale*, 150 Vt. 478 (1988). Such "prohibited conduct" certainly includes assault. This General Regulation does not limit patrons' misconduct to that occurring within the licensed premises, but extends to "the streets, sidewalks, parking lots or highways adjacent thereto," which is where the fight occurred. The General Regulation also allows the Board to infer, as it did here, that the Licensee failed to take appropriate steps to control the conduct of its patrons, and anticipated (or should have anticipated) that a fight involving Mr. Fryar would ensue.
- b. The facts that establish a violation of General Regulation No. 36(a) by at least a preponderance of the evidence, if not conclusively, are:
 - i. Mr. Fryar was served and consumed alcoholic beverages at the Licensee's establishment on October 17, 2014;
 - ii. Mr. Fryar's level of intoxication was visible to the Licensee's owner, bartender and "peacekeeper;"
 - iii. Mr. Fryar required a designated driver;
 - iv. Mr. Fryar was "cut off" by the Licensee's bartender;
 - v. Mr. Fryar became angry at being "cut off" by the bartender and needed to be calmed down;
 - vi. Licensee's "peacekeeper" had such concern with Mr. Fryar's level of intoxication that she sought to have Mr. Fryar perform a sobriety test, asking him to stand on one leg;
 - vii. Mr. Fryar audibly boasted about how tough he is and was "getting loud"; and
 - viii. Mr. Fryar was not removed from Licensee's establishment, but was permitted to pay his tab and leave on his own.
- c. Given these findings, we conclude that Mr. Fryar had been allowed to stay on the licensed premises while displaying signs of intoxication from alcohol and that Mr.

Fryar's subsequent conduct outside the licensed premises should have been anticipated.

9. Appropriate Sanction:

- a. To craft an appropriate sanction for Licensee's violation of General Regulation Nos. 17 and 36(a), a review of the Licensee's enforcement history is necessary.
- b. Licensee's enforcement history since receiving its licenses in February 2012 reveals a prior violation of General Regulation No. 17 on June 9, 2012 for which a \$500.00 fine was paid. There was also a violation of General Regulation No. 42 for outside consumption with no outside consumption permit in March 2014 resulting in a \$200.00 fine. These would be considered aggravating factors. In mitigation of a potential sanction, however, the Board considered the Licensee's cooperation with law enforcement by timely calling the police to respond to the bar fight and for its efforts, notwithstanding some confusion, to cooperate with law enforcement once they arrived. This resulted in a lesser penalty.
- c. The Board concludes, by majority vote, that a suspension of Licensee's licenses for ten (10) days is appropriate, five days for the violation of each General Regulation.
- d. Further, given the issues with public safety that the events of October 17, 2014 at Licensee's establishment raise, after the suspension is served, Licensee shall not be allowed to serve alcoholic beverages after 1:00 a.m. on any day of the week.

ORDER


Based on the foregoing Findings of Fact and Conclusions of Law, and by a majority vote of the Board, Dusty Bottle, LLC has violated General Regulations Nos. 17 and 36(a). The Board hereby **ORDERS** that Licensee's First and Third Class Liquor Licenses be suspended for Ten (10) Days, from the opening of business on Tuesday, April 21, 2015 to the close of business on Thursday, April 30, 2015.

Service of alcoholic beverages at Licensee's establishment shall cease at 1:00 a.m. each business day. This condition shall be effective immediately and continue in effect during any and all subsequent license renewal periods.

The Board also **ORDERS** that every employee of Licensee, including Mr. Pike, receive in-person DLC alcohol server retraining to its satisfaction within 45 days of this Order.

DATED at Montpelier, Vermont this 1st day of April 2015.

VERMONT LIQUOR CONTROL BOARD

By: 
Stephanie M. O'Brien, Chair

RIGHT TO APPEAL

Within 30 days after copies of this Order have been mailed, either party may appeal to the Vermont Supreme Court by filing a Notice of Appeal with the Department of Liquor Control and paying the requisite filing fee. *See* 3 V.S.A. § 815(a); V.R.A.P. 4 and 13(a).